No. 16-1466

IN THE

Supreme Court of the United States

MARK JANUS,
Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31 ET AL.,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE HUMAN RIGHTS CAMPAIGN, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., THE NATIONAL CENTER FOR LESBIAN RIGHTS, THE NATIONAL LGBTQ TASK FORCE, AND PFLAG AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. LGBT WORKERS FACE WORKPLACE DISCRIMINATION THAT DIMINISHES THEIR PERSONHOOD 4

II. UNIONS DEPEND ON FAIR-SHARE FEES TO HELP COMBAT AND ADDRESS DISCRIMINATION AND PROVIDE IMPORTANT BENEFITS 10

A. Unions Collectively Bargain For Antidiscrimination Provisions And Accompanying Grievance Procedures 10

B. Unions Secure Health Benefits For All Workers And Their Families 16

III. COLLECTIVE BARGAINING HAS FAR-REACHING POSITIVE CONSEQUENCES FOR WORKERS, EMPLOYERS, AND TAXPAYERS 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page

Cases

Abood v. Detroit Board of Education,
431 U.S. 209 (1977) 4

C.I.R. v. Schleier,
515 U.S. 323 (1995) 9

EEOC v. Shell Oil Co.,
466 U.S. 54 (1984) 4

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 11

G.G. v. Gloucester Cty. Sch. Bd.,
654 F. App'x 606 (4th Cir. 2016) 11

Hively v. Ivy Tech Cmty. Coll. of Ind.,
853 F.3d 339 (7th Cir. 2017) 12

Kolstad v. Am. Dental Ass'n,
527 U.S. 526 (1999) 4

Lawrence v. Texas,
539 U.S. 558 (2003) 3

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 3, 9

United States v. Windsor,
570 U.S. 744 (2013) 16

United Steelworkers of Am. v. Warrior & Gulf Nav. Co.,
363 U.S. 574 (1960) 15

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

Elizabeth Ashack, Bureau of Labor Statistics, *Employer-sponsored benefits extended to domestic partners*, Mar. 2014 17

M.V. Lee Badgett et al., The Williams Inst., *The Business Impact of LGBT-Supportive Workplace Policies* (2013) 15, 20

Josh Bivens et al., Econ. Policy Inst., *How today's unions help working people: Giving workers the power to improve their jobs and unrig the economy* (2017) 17

Crosby Burns et al., Ctr. for Am. Progress, *Gay and Transgender Discrimination in the Public Sector: Why It's a Problem for State and Local Governments, Employees, and Taxpayers* (2012) 19

Crosby Burns, Ctr. for Am. Progress, *The Costly Business of Discrimination: The Economic Costs of Discrimination & the Financial Benefits of Gay & Transgender Equality in the Workplace* (2012) 20

Miriam Frank, Out in the Union: A Labor History of Queer America (2014) 13, 16, 18, 20

Gay And Transgender Discrimination in the Public Sector, AFSCME, https://www.afscme.org/news/publications/gay-and-transgender-discrimination-in-the-public-sector. (last visited Jan. 18, 2018) 14

TABLE OF AUTHORITIES
(continued)

Page

Jaime M. Grant et al., Nat'l Ctr. for Transgender Equality, Nat'l Gay & Lesbian Task Force, *Injustice at Every Turn: A Report of the Nat'l Transgender Discrimination Survey* (2011) 6, 8, 17

Human Rights Campaign Foundation, *The Cost of the Closet and the Rewards of Inclusion* (2014) 9, 19, 20

Yeongsik Kim, Comment, *Using Collective Bargaining to Combat LGBT Discrimination in the Private-Sector Workplace*, 30 Wis. J.L. Gender & Soc'y (2015).....10, 15

Nat'l Op. Research Ctr. at Univ. of Chi., Gen. Soc. Survey (GSS), http://www.norc.org/Research/Projects/Pages/ general-social-survey.aspx (last visited Jan. 17, 2018).....7

Brad Sears & Christy Mallory, *Employment Discrimination Against LGBT People: Existence and Impact, in* Gender Identity and Sexual Orientation Discrimination in the Workplace (Christine Michelle Duffy & Denise M. Visconti eds., 2014) 5, 6, 8, 9

Brad Sears & Christy Mallory, The Williams Inst., *Documented Evidence of Employment Discrimination & Its Effects on LGBT People* (2011) 6, 7, 8

TABLE OF AUTHORITIES
(continued)

Page

Brad Sears, Nan D. Hunter & Christy Mallory, The Williams Inst., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* (2009) 5, 6, 8

Jennica R. Webster et al., *Workplace contextual supports for LGBT employees: A review, meta-analysis, and agenda for future research*, Human Res. Mgmt. (2017). 15, 16

STATEMENT OF INTEREST[1]

Amici are organizations committed to eliminating discrimination against lesbian, gay, bisexual and transgender ("LGBT") individuals in the workplace. The question presented is critical to that goal.

Amicus curiae Human Rights Campaign ("HRC") is the largest national LGBT political organization. HRC envisions an America where LGBT people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is freedom from discrimination and access to equal opportunity.

Amicus curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of LGBT people and those living with HIV through impact litigation, education, and policy.

Amicus curiae the National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of LGBT people and their families

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[1] No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only the amici and their attorneys have paid for the filing and submission of this brief. Pursuant to Rule 37.3(a), all parties have granted blanket consent to the filing of amicus curiae briefs.

through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families. NCLR has a particular interest in promoting equal opportunity for LGBT people in the workplace and represents LGBT people in employment and other cases in courts throughout the country.

Amicus curiae the National LGBTQ Task Force has worked since 1973 to build power, take action, and create change to achieve freedom and justice for Lesbian, Gay, Bisexual, Transgender and Queer ("LGBTQ") people and their families. The Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all. LGBTQ laborers routinely face discrimination and mistreatment because of their identity in workplaces, making union membership and representation an integral bulwark protecting the LGBTQ community's employment rights.

Amicus curiae PFLAG National, founded in 1972 with the simple act of a mother publicly supporting her gay son, is the nation's largest organization uniting families, allies, and LGBTQ people. Now entering its 45th year of providing support, education, and advocacy, PFLAG has nearly 400 chapters and 200,000 supporters crossing multiple generations of American families in major urban centers, small cities and rural areas across the United States, Washington D.C., Puerto Rico, and the largest non-stateside U.S. military installation and base in the world, located in Germany.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States has made significant strides toward LGBT equality since the days of *Lawrence v. Texas*, 539 U.S. 558 (2003), but the undeniable reality remains that many LGBT individuals face significant hurdles and high rates of discrimination in the workplace. Such discrimination is unfair, interferes with LGBT individuals' ability to support their families, and imposes significant economic costs on public employers and taxpayers. Countenancing systematic subordination on the basis of sexual orientation is also an affront to the equal dignity and personhood of LGBT individuals. *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2602, 2608 (2015). Yet that discrimination—for far too long regarded as not wrong at all—is difficult to combat, especially for individual employees who depend on their jobs and fear retaliation for speaking up, and employees who are unable to take on the high cost of litigation for the uncertain prospect of relief in court.

For many LGBT workers, unions have opened the door to equal treatment and made justice possible when other avenues to relief have been too risky or prohibitively expensive. Through the collective bargaining process, unions secure robust antidiscrimination protections and effective grievance mechanisms for LGBT workers. These valuable protections deter discrimination in a number of important and measureable ways, and provide a speedy remedy at no cost to the individual employee when it occurs. By bargaining for LGBT workers, unions serve the primary purpose of federal antidiscrimination law: eliminating discrimination

and avoiding harm through the adoption of antidiscrimination policies. *See, e.g.*, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984).

The fair-share fees this Court approved in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), provide public-sector unions with the resources needed to bargain for these and other vital protections. Overturning *Abood* would hamper union efforts to prevent and redress workplace discrimination against LGBT individuals and other workers, as well as efforts to promote open and accepting workplaces for all employees, and risk imposing associated costs on public-sector employers and taxpayers.

The story of the important role that secure, fee-supported unions have played in securing equal treatment for LGBT workers may not be well known to members of the public, but it is very well known to amici and their members. Amici write separately to tell that story so that the Court understands the full scope of what is at stake in the case at bar.

ARGUMENT

I. LGBT WORKERS FACE WORKPLACE DISCRIMINATION THAT DIMINISHES THEIR PERSONHOOD

State and local governments employ approximately one million individuals who identify as LGBT. Brad Sears, Nan D. Hunter & Christy Mallory, The Williams Inst., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* 1-1 (2009)

(hereinafter *Documenting Discrimination*). These individuals are dedicated public servants who work to support their families and because they believe in their employers' service missions. LGBT public employees serve their communities as police officers, firefighters, nurses, librarians, sanitation workers, teachers, and more.

Emerging research suggests that a large proportion of LGBT workers—in both the public and private sectors—experience discrimination in the workplace because of their sexual orientation and/or gender identity. Brad Sears & Christy Mallory, *Employment Discrimination Against LGBT People: Existence and Impact*, *in* Gender Identity and Sexual Orientation Discrimination in the Workplace 40-3 to 40-12 (Christine Michelle Duffy & Denise M. Visconti eds., 2014) (hereinafter *Employment Discrimination Against LGBT People*). This discrimination takes various forms, including pay disparities and verbal and physical harassment.

In terms of economic discrimination, numerous studies—all of which control for productivity—show that gay male employees are paid less on average than their heterosexual male coworkers. Sears & Mallory, *Employment Discrimination Against LGBT People* 40-16. The pay gap ranges between 10 and 32 percent for gay men compared to their heterosexual peers, and researchers attribute this gap to different treatment of workers because of their sexual orientation. *Ibid.* Research suggests that lesbian workers earn less than both heterosexual and gay men. *Documenting Discrimination* 10-1. And transgender individuals report experiencing unemployment at twice the rate of the general

population. Jaime M. Grant et al., Nat'l Ctr. for Transgender Equality, Nat'l Gay & Lesbian Task Force, *Injustice at Every Turn: A Report of the Nat'l Transgender Discrimination Survey* 3 (2011) (hereinafter *Injustice at Every Turn*).

Recent studies also identify wage gaps in the public sector based on sexual orientation. Specifically, gay, lesbian, and bisexual government employees earn 8 to 29 percent less than their heterosexual counterparts. *Documenting Discrimination* 10-1 to 10-2.

These wage gaps in the private and public sectors persist across geographic boundaries: "Census data analyses show that men in same-sex couples earn less than men in opposite-sex marriages earn in 47 states and the District of Columbia." *Employment Discrimination Against LGBT People* 40-16 (footnote omitted).

Discrimination against LGBT workers goes beyond pay disparities—recent studies show that LGBT employees and their non-LGBT coworkers consistently report having experienced or witnessed overt discrimination based on sexual orientation or gender identity in the workplace, including harassment and termination. Brad Sears & Christy Mallory, The Williams Inst., *Documented Evidence of Employment Discrimination & Its Effects on LGBT People* 2 (2011) (hereinafter *Documented Evidence of Employment Discrimination*).

Since 1972, the National Opinion Research Center at the University of Chicago has conducted an annual General Social Survey ("GSS") that reliably monitors social and demographic changes in

the United States. *Documented Evidence of Employment Discrimination* 4; *see also* Nat'l Op. Research Ctr. at Univ. of Chi., Gen. Soc. Survey (GSS), http://www.norc.org/Research/Projects/Pages/general-social-survey.aspx (last visited Jan. 17, 2018) ("Except for U.S. Census data, the GSS is the most frequently analyzed source of information in the social sciences."). In 2008, the GSS asked survey participants about their sexual orientation for the first time. *Ibid.* Twenty-seven percent of the respondents who identified as lesbian, gay, or bisexual—including private- and public-sector employees—reported experiencing employment discrimination because of their sexual orientation during the five years prior to the survey. *Ibid.* That number was even higher—38 percent—for respondents who reported being open about their sexual orientation in the workplace. *Ibid.* "Harassment was the most frequently reported form of sexual orientation-based discrimination by respondents who were open about being [lesbian, gay, or bisexual] in the workplace . . . followed by losing a job. . . ." *Ibid.* The 2008 GSS also separately reported responses from lesbian, gay, and bisexual individuals working just in the public sector—"25% of LGB-identified respondents who were employed by federal, state, or local government reported having experienced employment discrimination because of their sexual orientation during the five years prior to the survey." *Ibid.*

Reported discrimination rates against transgender individuals are even higher. A full 70 percent of respondents to a 2009 survey of transgender individuals reported having experienced workplace discrimination related to their gender

identity. *Documented Evidence of Employment Discrimination* 7. In 2011, 78 percent of respondents in the largest survey of transgender people to date reported having experienced workplace discrimination related to their gender identity. *Id.* (citing *Injustice at Every Turn*).

A 2009 report by the Williams Institute at UCLA School of Law documented more than 380 illustrative examples of discrimination and harassment of public-sector LGBT workers from 1980 through 2009. *Employment Discrimination Against LGBT People* 40-11 (citing *Documenting Discrimination* 12-1 to 12-189). These examples, involving 49 states and every branch of state government, included severe verbal harassment and instances of physical violence in which "a gay employee of the Connecticut State Maintenance Department was tied up by his hands and feet; a firefighter in California had urine put in her mouthwash; a transgender corrections officer in New Hampshire was slammed into a concrete wall; and a transgender librarian at a college in Oklahoma had a flyer circulated about her declaring that God wanted her to die." *Id.* at 40-11 to 40-12.

In light of such discrimination against LGBT individuals, it is not surprising that more than half of all LGBT workers nationwide report hiding their sexual orientation or gender identity in the workplace. Human Rights Campaign Foundation, *The Cost of the Closet and the Rewards of Inclusion* 9 (2014) (hereinafter *Cost of the Closet*). In related contexts, this Court has recognized that enduring such discrimination "is a fundamental injury to the individual rights of a person." *C.I.R. v. Schleier*, 515

U.S. 323, 339 (1995) (O'Connor, J., dissenting) (citation omitted). As Justice O'Connor recognized, "[s]uch offense to the rights and dignity of the individual attaches regardless of whether the discrimination is based on race, sex, age, or other suspect characteristics." *Ibid.*

Discrimination on the basis of sexual orientation and gender identity not only diminishes the dignity and personhood of LGBT individuals, *cf. Obergefell*, 135 S. Ct. at 2602, 2608, it also can have a demonstrable negative impact on their mental and physical health. Research regarding mental and physical health outcomes for LGBT people supports this conclusion: "High levels of perceived discrimination or fear of discrimination among LGBT people have been linked" to various negative mental health outcomes, including "psychological distress, depression, loneliness, and low self-esteem." *Employment Discrimination Against LGBT People* 40-18 (footnotes omitted); *see also id.* at 40-17 (quoting U.S. Dep't of Health & Human Servs., Healthy People 2010: Understanding & Improving Health 16 (2d ed. 2000)) (noting that the U.S. Department of Health and Human Services has identified the gay and lesbian population as a group requiring special public health attention because "issues surrounding personal, family, and social acceptance of sexual orientation can place a significant burden on mental health and personal safety.").

While LGBT individuals have long faced discrimination on the basis of sexual orientation and gender identity in both public- and private-sector workplaces, research systematically documenting

their experiences is relatively recent. Unions, which work tirelessly to protect the civil and economic rights of all workers, have served and continue to serve a crucial function in preventing and addressing discrimination against LGBT workers. In order to do so, however, unions in the public and private sectors must remain financially viable.

II. UNIONS DEPEND ON FAIR-SHARE FEES TO HELP COMBAT AND ADDRESS DISCRIMINATION AND PROVIDE IMPORTANT BENEFITS

Unions employ collective bargaining and grievance procedures to create and enforce contractual antidiscrimination provisions that protect the safety and dignity of all workers. Unions also safeguard workers' wellbeing by securing important health benefits for all workers and their families.

A. Unions Collectively Bargain For Antidiscrimination Provisions And Accompanying Grievance Procedures

The collective bargaining process offers a platform uniquely suited to creating and enforcing workplace rights that exist independently of any state or federal law. Yeongsik Kim, Comment, *Using Collective Bargaining to Combat LGBT Discrimination in the Private-Sector Workplace*, 30 Wis. J.L. Gender & Soc'y 73, 74 (2015) (hereinafter *Using Collective Bargaining*). Public-sector unions across the country have long used their financial resources—including fair-share fees—to bargain for antidiscrimination provisions that provide protections beyond the scope of available statutory

protections, including protections on the basis of sexual orientation and gender identity. Unions' efforts to combat anti-LGBT discrimination began decades ago, when there was no judicial recognition that existing federal law against sex discrimination logically encompasses anti-LGBT discrimination. Unions recognized early on that a simple, explicit ban on "sexual orientation discrimination" or "gender identity discrimination" in a collective bargaining agreement ("CBA") streamlines dispute resolution for both workers and their employers. The explicit contractual provision provides clear guidance to all concerned, thereby furthering the paramount objective of Title VII, which is the optimal prevention of discrimination, rather than redress after it occurs. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (Title VII aims, chiefly, "not to provide redress but to avoid harm").[2]

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[2] Unions still have an important role to play in combating discrimination even now that lower courts have overwhelmingly recognized that to discriminate "because of such individual's . . . sex" includes discrimination against transgender employees, and are increasingly recognizing coverage of discrimination against lesbians, gay men, and bisexuals. *See generally G.G. v. Gloucester Cty. Sch. Bd.*, 654 F. App'x 606, 607 (4th Cir. 2016) ("The First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution."); *see also, e.g., Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017)

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Thus, the longstanding work of unions against anti-LGBT discrimination is important for all LGBT workers, particularly for those in states that do not prohibit discrimination on the basis of sexual orientation or gender identity as a matter of state law.[3]

As early as 1974, two American Federation of State, County and Municipal Employees ("AFSCME") local unions—one representing bus drivers in Ann Arbor, the other public library workers in Seattle—negotiated CBAs that expressly prohibited discrimination based on sexual orientation. Miriam Frank, Out in the Union: A Labor History of Queer America (2014) 105–07. In the late 1970s, New York City's Motion Picture

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(en banc) (recognizing "the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex"). Antidiscrimination provisions in CBAs still (and will continue to) provide valuable, efficient mechanisms for resolving incidents without the need for judicial involvement.

[3] Currently, only twenty-nine states prohibit discrimination against public employees on the basis of sexual orientation or gender identity. An additional five states prohibit discrimination against public employees on the basis of sexual orientation. Movement Advancement Project, *State laws or policies that prohibit discrimination against state employees on the basis of sexual orientation or gender identity*, http://www.lgbtmap.org/equality-maps/non_discrimination_laws/state_employees.

Projectionists Local 306 added "sexual preference" to its antidiscrimination articles. *Id.* at 59. Historical accounts reflect that Local 306 also made regular donations to lesbian and gay charities and supported gay colleagues suffering from AIDS. *Ibid.* Uptown in New York City in the mid-1980s, the Columbia clerical local union improved wages and benefits and then leveraged "that secure economic context" to collectively bargain for protections and benefits for LGBT workers, including: nondiscrimination protection, spousal equivalent bereavement leave, health coverage, and tuition benefits for domestic partners. *Id.* at 104. In 1989, a Boston school bus driver filed a grievance with his union after a supervisor with access to his disability records revealed that the driver had AIDS, which led to the driver enduring verbal and physical harassment, including being chained to a radiator. *Id.* at 117. The local union—United Steel Workers of America Local 8751—rallied in support of his grievance, and the company agreed to provide the worker with permanent health insurance and to sponsor AIDS training for the entire workforce. *Ibid.*

Unions also pioneered early protections for transgender workers. In the 1980s, a union steward in an industrial laundry facility in New Jersey was harassed when she returned to work after gender reassignment surgery. *Id.* at 2. She raised the issue with her representative from the Amalgamated Clothing and Textile Workers Union who both resolved her complaint and successfully negotiated with management to add "change of sex" to the list of protected classes during the next round of contract negotiations. *Ibid.*

Labor unions' early leadership in this area has led to contractual protections that now cover thousands of LGBT workers. Currently, more than 1,700 AFSCME union contracts include sexual orientation as part of a nondiscrimination clause, and many also include language prohibiting discrimination on the basis of gender identity. *Gay And Transgender Discrimination in the Public Sector*, AFSCME, https://www.afscme.org/news/publications/gay-and-transgender-discrimination-in-the-public-sector. (last visited Jan. 18, 2018). The Service Employees International Union ("SEIU") has affirmed its "commitment to equal rights for all our members, regardless of sexual orientation" and resolved to "make it a collective bargaining . . . goal to ensure that all members enjoy equal rights and benefits." SEIU, Convention Resolution, *Proposal #205: Equal Rights For All SEIU Members* (2004). In 2005, SEIU United Health Care Workers West negotiated a CBA with Kaiser Permanente that prohibits "discrimination against any Employee or applicant because of . . . race, color, religion, creed, national origin, ancestry, gender, *gender identity, sexual orientation*, age, physical or mental disabilities, political affiliation, marital status, medical condition (as defined by applicable law), or veteran status." Collective Bargaining Agreement, SEIU United Healthcare Workers W. and Kaiser Permanente, Art. VIII (Oct. 1, 2005) (emphasis added). The minute the CBA became effective, its antidiscrimination protections extended to 55,000 healthcare workers in California.

Antidiscrimination provisions in collective bargaining agreements—which serve as the "agreed-upon rule of law" governing employers and workers,

United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 580 (1960)—protect the safety and dignity of all workers, particularly those who identify as LGBT. First, these provisions deter discrimination in concrete ways. Research suggests that implementing LGBT-supportive policies in the workplace results in lower reported levels of discrimination. Jennica R. Webster et al., *Workplace contextual supports for LGBT employees: A review, meta-analysis, and agenda for future research*, Human Res. Mgmt. 10 (2017) (hereinafter *Workplace contextual supports for LGBT employees*); *see also* M.V. Lee Badgett et al., The Williams Inst., *The Business Impact of LGBT-Supportive Workplace Policies* 7 (2013) (hereinafter *Business Impact of LGBT-Supportive Workplace Policies*) ("Research suggests that LGBT employees experience less discrimination when their employer has a nondiscrimination policy that includes sexual orientation and gender identity.").

Second, codifying antidiscrimination prohibitions in union contracts allows workers to invoke grievance procedures to address and resolve violations. Grievance procedures vary across unions and collective bargaining agreements but often start with informal resolution measures, move to more formal committee review, and, if necessary, culminate in arbitration or litigation. *Using Collective Bargaining* 90.

Thirdly, when consistently implemented and enforced, these policies have been shown to impact the workplace and inter-worker relations, contributing to an open and accepting workplace for

LGBT workers. *Workplace contextual supports for LGBT employees* 11.

B. Unions Secure Health Benefits For All Workers And Their Families

Unions have played a crucial role in negotiating for vanguard health and benefit plans for every employee, including LGBT workers and their families. For example, in 1982 the staff union at the Village Voice in New York City negotiated an extension of the paper's health plan to "spouse equivalents," which paved the way for modern domestic partner benefits. Frank, Out in the Union 109–11. New York City's Gay Teachers Association and the Lesbian and Gay Issues Committee of District Council 37 of AFSCME, the city's largest municipal union, were also instrumental in securing full domestic partner benefits for all New York City municipal employees, including retirees, predating changes to New York City law to provide these same benefits. *Id.* 122–23.

Two recent surveys—both conducted prior to this Court's ruling in *United States v. Windsor*, 570 U.S. 744 (2013)—illustrate unions' ongoing commitment to providing inclusive and comprehensive benefits to their members. The U.S. Bureau of Labor Statistics reported that as of March 2013, 51 percent of all unionized civilian workers—including state and local employees—had access to health care benefits for unmarried same-sex partners, compared to only 28 percent of nonunionized civilian workers. Elizabeth Ashack, Bureau of Labor Statistics, *Employer-sponsored benefits extended to domestic partners*, Mar. 2014, at 3. A 2011 survey of transgender Americans found that 19 percent of respondents

lacked any health insurance compared to 17 percent of the general population, and only 51 percent of respondents had employer-funded coverage compared to 58 percent of the general population. *Injustice at Every Turn* 76. In response, the SEIU passed a convention resolution in 2012 encouraging "all unions to provide trans-inclusive healthcare coverage for transgender employees who work for those unions." SEIU, Convention Resolution, *Resolution #304A: Trans-Inclusive Health Insurance Coverage* (2012).

III. COLLECTIVE BARGAINING HAS FAR-REACHING POSITIVE CONSEQUENCES FOR WORKERS, EMPLOYERS, AND TAXPAYERS

Collective bargaining contributes to safer and healthier workplaces and can help reduce or avoid the expensive consequences of workplace discrimination.

Research suggests that unions create safer workplaces—especially for LGBT workers—in part because workers are more likely to report safety issues when they know that their union will protect them from repercussions. Josh Bivens et al., Econ. Policy Inst., *How today's unions help working people: Giving workers the power to improve their jobs and unrig the economy* 12 (2017). Unions also contribute to workplace health and safety by educating workers and the public about public health issues, including those that have historically affected the LGBT community.

For example, in the early 1980s, SEIU Local 250—which represented thirty thousand hospital

workers at voluntary and public facilities in the San Francisco Bay Area—created an AIDS committee. Frank, Out in the Union 119. The AIDS crisis was particularly devastating to gay individuals and heightened workplace discrimination against gay men because of stereotypes and misinformation about HIV transmission. *See, e.g., id.* at 117–20. The SEIU AIDS committee worked with local doctors to produce a fact sheet, "AIDS and the Health Care Worker," which provided information about the AIDS epidemic and explained the low likelihood of transmission through casual contact at work. *Id.* at 119. "SEIU adapted 'AIDS and the Health Care Worker' to include material on occupational safety and best clinical practices and then distributed it nationally." *Ibid.* The brochure went through five editions in English and Spanish between 1984 and 1987, incorporating new research about AIDS and HIV with each printing. *Id.* 120.

Local AFSCME unions also helped combat discrimination against gay and bisexual men stemming from fear and misinformation about AIDS. In 1986, an X-ray technician at Temple University's dental school refused to attend to a patient with AIDS out of fear that HIV might be transmitted through saliva. Frank, Out in the Union, 117. The X-ray technician called her local union, AFSCME Local 1723, for support. Union president Gary Kapanowski, a gay man, was familiar with the most recent information regarding HIV transmission; he reassured the technician that wearing her required surgical gloves would prevent transmission of the disease. *Ibid.* Kapanowski realized that all members of his union would benefit from AIDS education and, in partnership with a local organization, offered an

AIDS training for Local 1723's forty dental assistants as well as graduate students, doctors, and dentists from the school to explain the realities of AIDS transmission and allay fears and misinformation. *Ibid.*

Finally, antidiscrimination provisions and accompanying grievance procedures in collective bargaining agreements help reduce the costly consequences of workplace discrimination, which include expenses related to recruitment, retention, and litigation, among others. In the public sector, "discriminating against workers based on their sexual orientation and gender identity hampers local and state governments' ability to recruit and retain the best and brightest employees in the labor force." Crosby Burns et al., Ctr. for Am. Progress, *Gay and Transgender Discrimination in the Public Sector: Why It's a Problem for State and Local Governments, Employees, and Taxpayers* 18–19 (2012). Moreover, hostile and discriminatory "work environments result in significant unnecessary costs since they increase absenteeism, lower productivity, and foster a less motivated, less entrepreneurial, and less committed workforce." *Id.* 19. When asked about experiencing a negative workplace environment because of their sexual orientation or gender identity, 30 percent of LGBT workers reported feeling distracted from work, 22 percent reported searching for a different job, and 15 percent reported staying home from work. *Cost of the Closet* 22.

Discrimination also leads to higher turnover rates, which is costly for all employers—recent estimates place the cost of replacing a departing employee between $5,000 and $10,000 for an hourly

worker, and between $75,000 and $211,000 for an executive who makes roughly $100,000 a year. Crosby Burns, Ctr. for Am. Progress, *The Costly Business of Discrimination: The Economic Costs of Discrimination & the Financial Benefits of Gay & Transgender Equality in the Workplace* 10 (2012). But "research has shown that employees who do not fear discrimination or have not experienced discrimination report fewer turnover intentions and higher levels of commitment to their employers." *Business Impact of LGBT-Supportive Workplace Policies* 17; *see also id.* at 11 (reporting that lesbian, gay and bisexual "employees who are covered by a nondiscrimination policy are more satisfied with their jobs than employees who are not covered by a policy"); *Cost of the Closet* 23 (one in four LGBT employees report staying in a job because the work environment was accepting).

Union grievance procedures provide an efficient and cost-effective way to resolve employment disputes, including complaints of discrimination based on sexual orientation or gender identity, short of pursuing litigation. Early examples of using grievance procedures to resolve discrimination against LGBT workers include: a retail worker initially denied a promotion in the late 1960s because his manager labelled him "a queer", a transgender retail employee in the mid-1970s allowed to keep their job, and an auto-plant worker facing verbal and physical harassment because of his sexual orientation in the 1990s, all of which were resolved without resorting to litigation in state or federal court. Frank, Out in the Union 114–16.

These are just some of the ways that collectively-bargained-for antidiscrimination protections and grievance procedures promote safe, supportive, and cost-efficient workplaces for all workers, including those who identify as LGBT.

CONCLUSION

The United States has a great deal further to go to ensure that all workers are treated with equal dignity in the workplace. Well-funded unions can help us get there by continuing to bargain for and enforce antidiscrimination and benefit provisions that protect all employees, including LGBT individuals and their families.

Dated: January 19, 2018

Respectfully submitted,

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